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Supreme Court of the United States

October Term, 1943. No. 138

THOMAS W. MORRELL, on behalf of himself and all other persons similarly situated,

Petitioners,

against

THE CITY OF NEW YORK, PELHAM ST. GEORGE BISSELL, as Presiding Justice of the Municipal Court of the City of New York; JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York; GEORGE J. MCMAHON, as Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District; ALMERINDO PORTOLIO, as Treasurer of the City of New York; PAUL KERN, as President of, and FERDINAND Q. MORTON and WALLACE S. SAYRE, as members of and constituting the Municipal Civil Service Commission of the City of New York.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

August 5, 1943.

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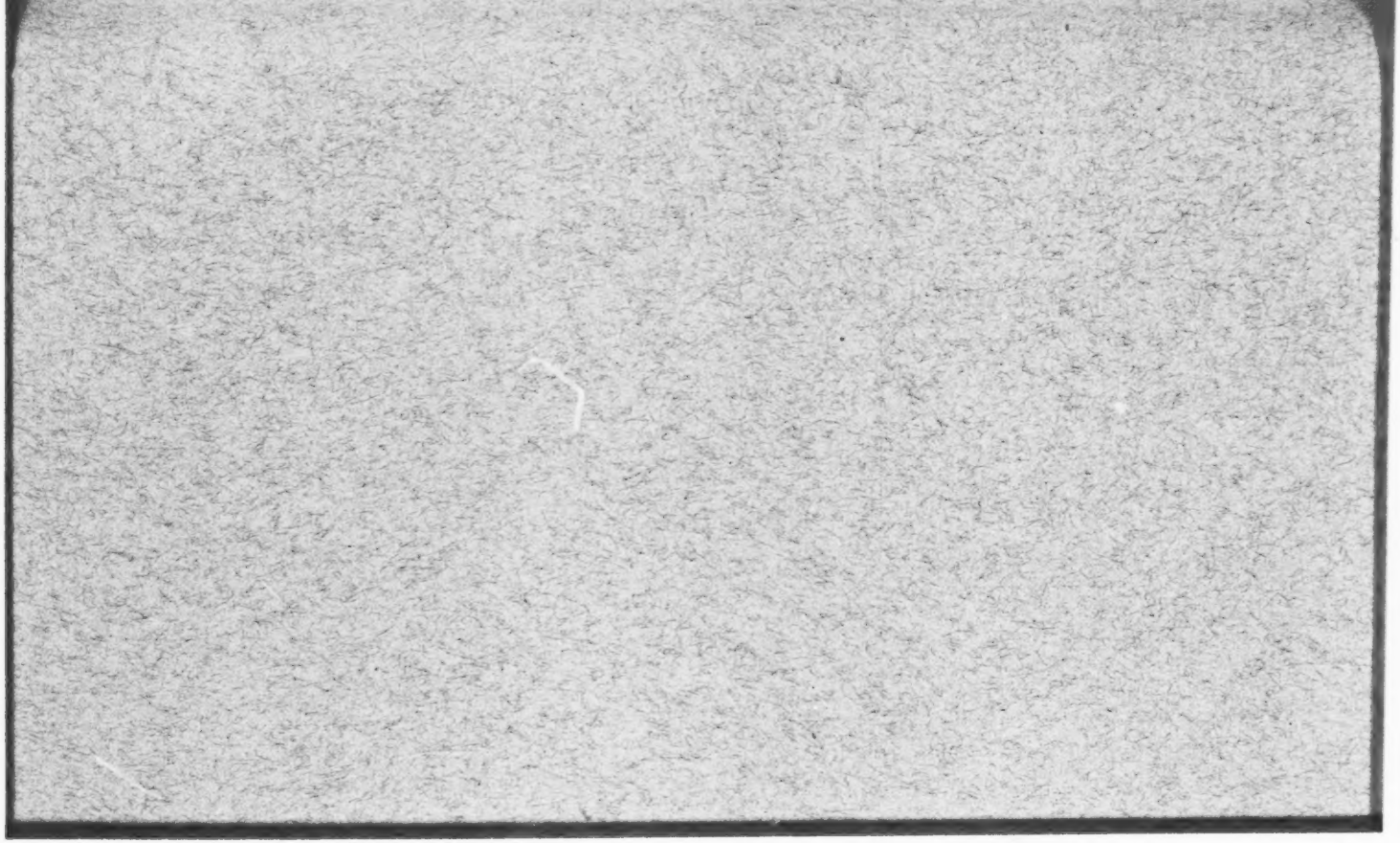

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

A group of municipal employees, aggrieved by the action of the Board of Estimate of the City of New York in omitting certain positions from the Budget for the year 1934, instituted an action at law for the salary which had been attached to the positions prior to their abolition. Relief was denied. 290 N. Y., mem. p. 62, 48 N. E. (2d) 708. The decision rests on non-federal grounds adequate to sustain it.

(1)

The controversy which petitioners seek to bring before this Court arose out of the action of the New York State

Civil Service Commission in refusing to reclassify certain municipal court clerkships from competitive to exempt, with the result that the positions could only be filled by persons who had taken a competitive examination. In adopting the 1934 Budget, now challenged because it made no provision (R., 46) for the petitioners, the Board of Estimate was without power to defy the State Civil Service Commission and to tolerate the continuance in office of employees, such as petitioners, who had not taken competitive examinations.

This subordination of municipal authority to state authority raises no federal question.

(2)

When an employee is left out of the budget, he cannot, under the law of New York, sue for his salary unless he first obtains an order of a competent court commanding the budgetary bodies of the City to restore the abolished position. *Thoma* v. *City of New York*, 263 N. Y. 402, 407 (1934). This principle of state law violates no federal right.

(3)

The exercise by the State of its power to abolish public offices raises no federal question. In *Newton* v. *Commissioners*, 100 U. S. 548 (1880), this Court said (p. 559):

> "The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler et al.* v. *Pennsylvania*, 10 How. 402."

This principle was reiterated in *Dodge* v. *Board of Education,* 302 U. S. 74, 78-79 (1937), and *Higginbotham* v. *City of Baton Rouge,* 306 U. S. 535, 538 (1939). There has accordingly been no violation of the obligation of contracts clause.

(4)

It is significant also that the petitioners are unable to show to this Court a certificate from the Court of Appeals to the effect that a question under the United States Constitution was raised and necessarily passed upon in deciding the appeal. For the form of such certificate which the Court of Appeals constantly uses in cases of this sort to facilitate the review of its determinations by this Court, see *People* v. *Kesbec, Inc.,* 282 N. Y. 777 (1940), and *People* v. *Beck,* 288 N. Y. 672 (1942), cert. den. 317 U. S. 696 (1943).

The New York Court of Appeals having decided the case without opinion, the absence of such a certificate is fatal, and would lead to the dismissal of the writ of certiorari even if it had already been granted. *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2 (1940). While in that case the defect was later supplied (309 U. S. 414), in the instant case it could not be supplied; for an examination of the brief filed in the Court of Appeals by the present petitioners shows that no federal question was raised by them in that court. The headnotes of that brief are: "I. Plaintiff and his assignors were duly appointed to their positions. II. The reduction of the salaries of plaintiff and his assignors to $2,000 per annum and their omission from the budgets for 1934 and subsequent years was illegal. III. The order was proper."

It would seem to be perfectly obvious that there is no federal question in the case, and that this Court is without jurisdiction to grant the writ.

Conclusion.

The petition for certiorari should be denied.

August 5, 1943.

Respectfully submitted,

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Corporation Counsel,
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